IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-232

RUSSELL BUFALINO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Russell Bufalino respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered on May 2, 1978 and the Order denying the Petition for Rehearing dated July 10, 1978.

Opinions Below

The opinion of the District Court denying the motion for suppression of evidence is reported at 432 F. Supp. 286 and appears at page 14a in the appendix to this petition. The opinion and judgment of the Court of Appeals affirming the judgment of conviction is not yet reported and appears at pages 1a and 26a in the appendix to this petition. The order of the Court of Appeals denying a

timely petition for rehearing appears at page 28a in the appendix to this petition.

Jurisdiction

The opinion and judgment of the Court of Appeals affirming the judgment of conviction was entered on May 2, 1978. A timely petition for rehearing and suggesting rehearing in banc was denied by order entered July 10, 1978. This petition for certiorari was filed within thirty days of the entry of that order. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Statute Involved

18 USC § 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the

time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Questions Presented

1. Does the intentional destruction by the Federal Bureau of Investigation of tape recordings of conversations between a Government witness and the Petitioner require suppression of other evidence relative to those conversations?

2. Does the right to trial by a fair and impartial jury require a mistrial be granted when the jurors complain to the Trial Court that they are "quite nervous" because two "husky and menacing" looking men, whom they associate with the Petitioner, have followed, glared at and attempted to start conversations concerning the case with a number of jurors and when the forelady of the jury in response to an ex parte interrogation by the Trial Court indicates this contact would interfere with her ability to decide the case fairly?

3. Does the constitutional prohibition against double jeopardy protect against cumulative sentencing for the crime of participating in the use of extortionate means to collect an extension of credit and conspiring to use extortionate means to collect an extension of credit?

4. Does due process require the dismissal of a prosecution based on the testimony of an informant who in exchange for testifiying, was paid by the Government in excess of $46,000.00 over a fifteen month period and who was assisted by Government agents in the commission of crimes while in the Witness Relocation Program?

Statement of the Case

The Petitioner, along with his co-defendants, Herbert Jacobs and Michael Sparber, was convicted on August 10, 1977, after jury trial in the U.S. District Court for the Southern District of New York, of violating 18 U.S.C. Section 894 (Extortion).

In January, 1976, Jack Napoli, a self-conceded con man, counterfeiter and smuggler, and the chief Government witness, gave information to the Federal Bureau of Investigation concerning the Petitioner, Russell Bufalino, and his co-defendant, Herbert Jacobs, in exchange for a cash payment of $400.00. In February, 1976, Jack Napoli swindled Herbert Jacobs, a jeweler, out of approximately $25,000.00 worth of jewelry by passing a bad check to Jacobs and by posing as a friend of Russell Bufalino. Shortly thereafter, Napoli went to the Federal Bureau of Investigation and rather than initiating a prosecution against Napoli for the swindle or requesting that Napoli return the stolen jewelry to Jacobs, the F.B.I. employed Napoli in the investigation of the alleged extortionate manner in which Mr. Jacobs sought the return of his property and more specifically, it is submitted, to cause the arrest and conviction of Russell Bufalino.

Napoli then had a series of conversations and meetings with the Defendants. On April 12, 1976, Napoli, equipped with a Nagra tape recorder and a Kel transmitter which transmitted to tape recorders operated by the F.B.I., entered a New York restaurant and approached Bufalino.

When Napoli asked Bufalino to shake his hand, Bufalino made the only alleged explicit threat to Napoli. The F.B.I. agent in charge of this case intentionally destroyed the tapes made from the Kel transmissions and at trial, over Bufalino's motion to suppress, the Nagra recordings (part of which were inaudible) and Napoli's testimony concerning the conversation were admitted into evidence.

In exchange for his testimony and cooperation in this case, Napoli was assured the Government would intercede in four charges pending against him in New Jersey for grand larceny and one charge in Florida for possession of a stolen driver's license. In addition, the Government promised to place Napoli, his wife and her children in the Witness Relocation Program with all of its accoutrements including a monthly subsistence in excess of $1,000.00, a change of identity, and all expenses paid. In this case Napoli received in excess of $46,000.00 in money and benefits within fifteen months. In order to obtain maximum benefits under the program, Napoli admittedly perjured himself before the Grand Jury testifying he was married to his then girlfriend so she could be included in the program. While being subsidized and supervised by the Government, Napoli engaged in the following criminal activities:

(a) He admittedly defrauded the Government by submitting phony medical vouchers for which he was paid. Although this fraud was uncovered, Napoli was permitted to remain in the program and no prosecution was instituted;

(b) He admittedly swindled another jeweler by passing a bad check in the amount of $2,000.00. Again, Napoli was permitted to remain in the program. No prosecution was instituted and no restitution was made to the jeweler;

(c) He obtained substantial loans from at least three banks by posing as a ten year employee of the Justice Department with a monthly income

ranging from $1,000.00 to $2,500.00. He used the marshals assigned to protect him as credit references and the marshals assisted Napoli in defrauding at least one bank by providing false information to that bank to corroborate Napoli's application for a loan. None of these loans were repaid.

During the trial, immediately after Napoli's direct testimony concerning threats made by Bufalino and after he testified about Government efforts to protect him from the defendants, the jurors sent a message to the Judge. The jurors, after much discussion among themselves, complained to the Court that they were "quite nervous" because of their contact with two "husky and menacing" men whom the Court believed the jurors associated with Bufalino. The Court conducted an ex parte examination of the jurors which revealed that "quite a few jurors" complained about being followed by these men; these men attempted to start conversations concerning the case with at least two jurors; and a number of jurors complained about the manner in which these men glared at them both in and out of the courtroom. The forelady of the jury, Ms. Henry, when questioned by the Judge, indicated that the conduct of these men would interfere with her ability to render a fair verdict. The Court refused Bufalino's motion for a mistrial and after the jury retired to deliberate, refused the request of counsel to examine the alternate jurors to determine the exact effect of the contact.

The jury returned a verdict of guilty as to all defendants on both counts of the indictment. On October 21, 1977, the Trial Court sentenced Bufalino to four years imprisonment and a $10,000.00 fine for conspiracy to use extortionate means to collect an extension of credit, and five years probation (to run consecutively) and a $10,000.00 fine for participating in the use of extortionate means to collect an extension of credit. The cumulative fine of $20,000.00 is in excess of the maximum fine allowed for a violation of 18 U.S.C. Section 894.

Reasons for Granting the Writ

I.

Destruction of tape recording discoverable under Rule 16 of the Federal Rules of Criminal Procedure and 18 U.S.C. 3500, required imposition of sanctions regardless of prejudice to the defendant.

The Government's prosecution in this case was based on a number of conversations between the chief Government witness and the defendants. Two recordings were made of each conversation, one by a Nagra body recorder and one recorded from Kel transmissions of the conversations. At a pretrial suppression hearing, the F.B.I. agent in charge of the case testified that the tapes from the Kel transmissions may have contained portions of the conversations inaudible on the Nagra recordings. That agent intentionally destroyed the Kel tapes prior to trial and prior to inspection by the defense. The defendants made a timely motion to suppress the Nagra tapes and the testimony of the Government witness concerning those conversations on the basis that the Government failed to preserve and produce the Kel tapes as required by 18 U.S.C. 3500, *Brady* v. *Maryland*, 373 U.S. 83 (1963) and Rule 16 of the Federal Rules of Criminal Procedure.

The Second Circuit agreeing that the Kel tapes constituted *Jencks* material also discoverable under Rule 16, harshly criticized the Federal Bureau of Investigation for destroying the tapes but refused to suppress evidence since there was no showing of prejudice to the defendants by reason of the destruction of the tapes.*

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* The Second Circuit agreed the Nagra tapes introduced in evidence contained gaps and inaudible passages upon which the Kel tapes might possibly have shed some light (Appendix p. 5a).

The Second Circuit's holding that there must be prejudice to the defendant prior to the imposition of sanctions under 18 U.S.C. 3500 is in direct conflict with the recent decision of the Ninth Circuit in the case of *U.S.* v. *Well,* 572 F. 2d 1383 (1978). In that case the Ninth Circuit held that the good faith destruction of tape recordings of conversations with witnesses even after the contents of those tape recordings were summarized in case memoranda, required suppression of the testimony of those witnesses regardless of whether the destruction of the tapes resulted in any prejudice to the defendant. In a per curiam opinion the Court stated at page 1384:

> *"The Jencks Act does not require the defendants to show prejudice.* The Act provides that after a Government witness testifies at trial, the Government must produce on request any previously made statements by that witness which related to the witnesses testimony on direct examination. 18 U.S.C. 3500 (b). If the Government fails to produce such statements, *the Court is required to strike the testimony of the witness.* 18 U.S.C. Section 3500 (d)" (Emphasis added)

The Second Circuit's holding in this case is also in conflict with the decision of the District of Columbia Court of Appeals in *U.S.* v. *Harrison,* 524 F. 2d 421 (D.C. Cir. 1975). In that case the Court stated that in the future it would impose full sanctions if the F.B.I. failed to preserve, for trial, rough notes of interviews with witnesses, even though no prejudice is shown to have resulted from the failure to preserve those notes. That Court rejected the need for showing prejudice as being in conflict with the rationale of *Jencks* and the teachings of *Brady.* As stated in *U.S.* v. *Harrison,* supra at page 431, there are some Courts that have found good faith destruction of discoverable material unobjectionable absent a showing of prejudice; also, as in the case at bar, some Courts, while declining to impose sanctions, harshly criticized F.B.I. practices resulting in the destruction of such material. And now, the D.C. Circuit has expressed an intent to impose full sanctions and the Ninth Circuit has actually imposed those sanctions regardless of the good faith of the prosecution and lack of apparent prejudice to the defendant. *U.S.* v. *Harrison,* supra, and *U.S.* v. *Well,* supra.

In short, the state of the law among the Circuits for the imposition of sanctions for destruction of discoverable material when there is no showing of prejudice to the defendant seems to be in conflict and confusion.

If sanctions are to be imposed uniformly in the future, this Court should grant this petition and resolve the conflict among the Circuits on this issue.

II.

Third party contact with jurors was presumptively prejudicial.

In *Remmer* v. *U.S.,* 347 U.S. 227, 229 (1954), this Court stated:

> "In a criminal case, any private communication, contact or tampering directly or indirectly with a juror during trial about the matter pending before the jury is deemed presumptively prejudicial . . . the burden rests heavily upon the Government to establish after notice to and hearing of the defendant, that such contact with the jury was harmless to the defendant."

The Second Circuit refused to apply the presumption of prejudice, required by *Remmer,* supra, to the contact in this case on the basis that the contact did not relate to a matter pending before the jury.

However, with respect to the forelady's testimony in response to the Trial Court's ex parte interrogation indicating that the contact complained of would interfere with

her ability to decide the case fairly,* the Second Circuit admitted:

> "Were this in fact a *Remmer* situation involving contacts related to the trial, Judge Lasker's failure to pursue the matter might give us some pause." (p. 10a)

It is submitted the Second Circuit's determination that the contact in this case did not fall within the ambit of *Remmer,* cannot be supported by the record and is in conflict with a reasonable interpretation of this Court's holding in *Remmer.*

In this case, two men described by the Trial Court as "husky and menacing", followed a number of jurors, a fact apparently ignored by the Circuit Court.

The clerk advised the Trial Court that the jurors complained about being followed. The forelady, Ms. Henry, and another juror, Ortiz, specifically complained to the Trial Court about being followed. A third juror, Valentine, advised the Court there was a discussion among the jurors about "quite a few" of the jurors being followed.

Two jurors complained that the same two "husky and menacing" men attempted to converse with them about the case and a number of jurors complained that these men "glared" at them both in and out of the courtroom. One juror warned the others to avoid the glares of these men and one juror described it as "unnerving". The clerk who initially related the jurors' complaints to the Trial Court stated that the jurors were "quite nervous".

The Trial Court, although not accusing the Petitioner of having anything to do with the contact, surmised the jurors associated these two men with the Petitioner.

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* When the Trial Court asked the forelady if anything occurred which would interfere with her ability to decide the case fairly, she described her contact with "two big guys". When asked again if this contact had influenced her in any way, she responded cryptically "I am for law and peace".

The Second Circuit's limitation of the ambit of *Remmer,* to exclude the contact in this case is contrary to what is required to preserve the defendant's right to a fair and impartial jury.

It is respectfully submitted this Petition should be granted since the decision of the Second Circuit in this case is in conflict with this Court's decision in *Remmer* v. *U.S.,* and further in conflict with the decisions of the Court of Appeals of the Sixth Circuit in which that Court strictly applied the *Remmer* presumption of prejudice. *Stone* v. *U.S.,* 113 F. 2d 70 (6th Cir. 1940); *U.S.* v. *Ferguson,* 486 F. 2d 968 (6th Cir. 1973).

III.

The cumulative sentences imposed by the Trial Court for conspiracy to use extortionate means to collect an extension of credit and for participation in any way in the use of extortionate means to collect an extension of credit violates the constitutional protection against double jeopardy.

The test to determine whether cumulative punishment is warranted was established in *Blockburger* v. *U.S.,* 284 U.S. 299, 79 L. Ed. 306 (1932). *Blockburger* simply states that cumulative sentencing is improper whenever it appears the proof of one offense proves every essential element of another or in other words, when one offense cannot be committed without necessarily committing another offense.

In this case the Petitioner was given cumulative sentences for the "substantive offense" defined by statute as "participating in any way" in the use of extortionate means to collect an extension of credit and for conspiracy to use extortionate means to collect an extension of credit.

Although we may agree with the Circuit Court that "proof of participation in any way" does not necessarily prove a conspiracy, the converse is not true. If there is

proof of a conspiracy to use extortionate means, there is necessarily proof of participation in any way in the use of extortionate means, participation being defined by Webster's New Twentieth Century Dictionary as "to share with others in some activity or enterprise." The phrase, "participate in any way" by its very definition includes a conspiracy. The Circuit Court erred when in applying the *Blockburger* test, it apparently defined the substantive offense as the use of extortionate means. If this were the case, cumulative sentencing would be proper. However, the language of Section 894 defines the substantive offense in much broader terms. Thus, while proof of a conspiracy does not necessarily prove the use of extortionate means, it does prove the "participation in any way" in the use of extortionate means.

The decision of the Second Circuit in this case is in conflict with the constitutional protection against double jeopardy as recently defined by this Court in *Jeffers* v. *U.S.*, —— U.S. ——, 53 L. Ed. 2d 168 (1977) and *Simpson* v. *U.S.*, —— U.S. ——, 55 L. Ed. 2d 70 (1978).

It is submitted this Court should vacate the sentence imposed in this case and remand to the Court of Appeals for proceedings consistent with *Simpson* v. *U.S.*, supra and *Jeffers* v. *U.S.*, supra.

IV.

Government payments to an informant in excess of $46,000.00 and Government involvement with the informant in the commission of crime while in the Witness Relocation Program is conduct so outrageous as to require dismissal of the prosecution.

In *U.S.* v. *Russell*, 411 U.S. 423, 36 L. Ed. 2d 366 (1973), this Court stated:

> "We may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process would absolutely bar the Government from invoking judicial process to obtain a conviction."

It is submitted that the Government's abuse of the Witness Relocation Program in this case constitutes such a situtaion. A majority of this Court reaffirmed the philosophy of *Russell*, supra, in *Hampton* v. *U.S.*, 425 U.S. 484, 48 L. Ed. 2d 113 (1976).

The benefits conferred upon the informant, Napoli, went so far beyond what was reasonably necessary for his protection as to be tantamount to a bribe.

Not only did the Government pay Napoli the outrageous sum of $46,000.00 within a fifteen month period; it shielded him from criminal prosecutions; it interceded in five criminal cases pending against him at the time of his admission to the program; Government agents turned their backs when, while on the program, Napoli defrauded the Government, another jeweler and three banking institutions out of substantial sums of money. On at least one occasion, U.S. marshals actually assisted Napoli in the commission of a crime when they provided false information to a bank in order to induce that bank to loan money to Napoli. That bank was never repaid by Napoli or the Government. In fact, the Government did nothing to repair any of the damage which resulted from Napoli's criminal activity under the auspices of the Relocation Program.

In recent years, the Government has greatly increased its use of the Witness Relocation Program. The ability to confer excessive benefits on witnesses under the guise of witness protection has in effect given the Government a license to bribe.

The willingness on the part of the Government to confer excessive benefits upon informants is frought with the possibility of perjured testimony and informants who will entice and entrap individuals into criminal activity for the pur-

pose of gaining admission into the Witness Relocation Program.

Since Napoli was a Government informant prior to this investigation, it is probable that he was well aware of the benefits he could obtain if placed in the program. It is also probable that he knew on three prior occasions witnesses were placed in the program in exchange for testifying against Bufalino. Even if the Government did not expressly induce him to swindle Jacobs by using Bufalino's name, it is possible that Napoli performed the swindle and used Bufalino's name for the purpose of angering Bufalino and inducing him to threaten Napoli so Napoli could go to the F.B.I. and obtain admission into the program.

Prior to this investigation, Napoli was destitute and being pursued by a number of loan sharks and law enforcement agencies. Admission to the program solved his problems. He received a "salary" of over $1,000.00 a month. He was shielded from both the loan sharks and criminal prosecution. He even obtained additional income by continuing his swindles with the assistance and protection of U.S. Government agents in a new location provided by the Government at his request. The possibility that criminals such as Napoli will entrap and encourage individuals to commit crimes and worse yet, the possibility that informers will lie to Government agents about the criminal activity of individuals in order to obtain admission to the program, requires this Court to restrict the type of benefits conferred by the Government under the program to what is reasonably necessary to protect the witness.

In a situation similar but much less egregious than the case at bar, the Fifth Circuit Court of Appeals exercised its supervisory powers and dismissed a prosecution where informants were paid on a contingent fee basis. *Williamson* v. *U.S.*, 311 F. 2d 441 (5th Cir. 1962).

There is a paucity of enlightening legal discussion concerning the Witness Relocation Program. Its increased

use and abuse by the Department of Justice requires direction and limitation from this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 9, 1978

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 636, 637, 663—September Term, 1977.

(Argued February 9, 1978 Decided May 2, 1978.)

Docket Nos. 77-1438, 77-1444, 77-1445

UNITED STATES OF AMERICA,

Appellee,

—against—

RUSSELL BUFALINO, MICHAEL SPARBER, and HERBERT JACOBS,

Defendants-Appellants.

Before:

HAYS, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from convictions under 18 U.S.C. § 894 for using extortionate means to collect extensions of credit and conspiracy to commit that crime, after jury trial before Lasker, *J.*, in the United States District Court for the Southern District of New York.

Affirmed.

BARBARA S. JONES, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Audrey Strauss, Assistant United States Attorney, of counsel), *for Appellee.*

CHARLES P. GELSO, New York, N.Y. (Wilfred L. Davis, of counsel), *for Defendant-Appellant Bufalino.*

WILLIAM J. GILBERTH, New York, N.Y. (James F. Haley, Jr., of counsel), *for Defendant-Appellant Sparber.*

ARNOLD E. WALLACH, New York, N.Y., *for Defendant-Appellant Jacobs.*

FEINBERG, *Circuit Judge:*

Russell Bufalino, Michael Sparber and Herbert Jacobs appeal from their convictions for using extortionate means to collect extensions of credit and conspiracy to commit that crime in violation of 18 U.S.C. § 894, following a jury trial before Judge Lasker of the United States District Court for the Southern District of New York.[1] Appellants raise numerous points, principally that the judge should have granted their motions to suppress certain tape recordings and testimony, that a mistrial should have been declared because of third-party contact with the jury, and

[1] Jacobs was placed on probation for three years and fined $2,500. Sparber received one year in prison on the conspiracy count, to be followed by five years probation on the substantive count. Bufalino was sentenced to four years imprisonment on the conspiracy count, to be followed by five years probation on the substantive count, with $10,000 fines imposed on both counts.

that appellants were not shown to have engaged in conduct prohibited by 18 U.S.C. § 894. We conclude that the judgments of conviction should be affirmed.

I. *The Facts*

The jury could have found as follows. In mid-February 1976, a singularly credulous New York jeweler named Herbert Jacobs entered into a number of transactions with one Jack Napoli wherein some $25,000 worth of diamonds were transferred to Napoli in exchange for a series of promises and a worthless check. Some of Napoli's success derived from repeated unauthorized invocations of the name of Russell Bufalino, who evidently constituted an impressive credit reference with Jacobs. When Napoli's vows of restitution went unmet, Jacobs called in Bufalino and Michael Sparber for help in collecting the moneys owed. There followed a series of threats by these two men, inducing Napoli to contact the FBI. Sparber at one point told Napoli's girl friend that she and her children would be jeopardized "[i]f Jack doesn't do the right thing." The FBI outfitted Napoli with devices which recorded and transmitted various telephone and face-to-face conversations between Napoli and appellants. During the surveillance period, Sparber and Bufalino warned Napoli that he would be subjected to bodily harm if he failed to honor his debts. Bufalino was recorded on one of the tapes as cursing Napoli and threatening that "I'm going to kill you." Jacobs told Napoli over the telephone that if he "showed . . . good faith, they're not gonna kill you." A review of these and related aspects of the record convinces us that the jury's verdict rested on an ample evidentiary foundation. It remains to consider appellants' divers assignments of error.

II. *The Suppression Motion*

Appellants argue that tapes of face-to-face conversations with Napoli and related testimony should have been suppressed, because an FBI agent destroyed certain additional tapes of the conversations. The recordings admitted in evidence were made by a so-called "Nagra" device on Napoli's person. The destroyed tapes came from a back-up recorder, which was part of a radio receiver surveillance unit monitoring transmissions from another device (a Kel transmitter) carried by Napoli.

Judge Lasker held a pretrial hearing upon appellants' motion to suppress evidence. An FBI agent testified that the principal reason for the Kel transmitter was to protect Napoli, and that, in reliance upon what he conceived to be standard Bureau policy, he disposed of the Kel back-up tapes about a week after they were made, upon determining that they were decidedly inferior to the Nagras. Condemning this ad hoc decision in strong terms, Judge Lasker nonetheless denied the motions to suppress in a memorandum opinion.

We do not understand the Government to deny that the destroyed materials constituted statements discoverable before trial under Fed. R. Crim. P. 16, and during trial under the provisions of the Jencks Act, 18 U.S.C. § 3500. We held in *United States* v. *Crisona,* 416 F.2d 107, 114-15 (2d Cir. 1969), cert. denied, 397 U.S. 961 (1970), that tapes of statements made by a defendant in the process of committing a crime were within the scope of Rule 16; we suggested but did not decide that such tapes might also constitute Jencks Act material if they included statements by a government witness and were recorded at the government's instigation. *Id.* at 113. That precise situation subsequently confronted us in *United States* v. *Miranda,* 526 F.2d 1319, 1327 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976), and we stated that both Rule 16 and the Jencks Act

entitled the defense to examine the taped material. See also *United States* v. *Birnbaum,* 337 F.2d 490, 497 (2d Cir. 1964). We adhere to that conclusion under the indistinguishable circumstances of the present case.

As Judge Lasker recognized, the Nagra tapes introduced in evidence contained gaps and inaudible passages upon which the back-up recordings, whatever their overall quality, might possibly have shed some light. This case thus falls into a regrettably sizeable class of prosecutions in which the defense might have been hampered by the Government's failure to live up to strict statutory obligations with respect to preservation of evidence. A review of the precedents reveals a distressing number of shredded, discarded, abandoned, and "intentionally non-preserved" documents, with those responsible for the most part—as here—professing no intention to suppress material evidence.[2] While we have decided that the special circumstances of the instant case militate against reversal on this ground, we will look with an exceedingly jaundiced eye upon future efforts to justify non-production of a Rule 16 or Jencks Act "statement" by reference to "department policy" or "established practice" or anything of the like. There simply is no longer any excuse for official ignorance regarding the mandate of the law. Where, as here, destruction is deliber-

[2] See, e.g., *United States* v. *Carrasco,* 537 F.2d 372 (9th Cir. 1976) (witness' handwritten diary, held to be a "statement," shredded by Drug Enforcement Administration agent pursuant to routine procedure); *United States* v. *Augello,* 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972) (defendant's taped statements destroyed by the police, who found them unintelligible); *United States* v. *Bryant,* 439 F.2d 642 (D.C. Cir. 1971) (Federal Bureau of Narcotics agent guilty of "intentional non-preservation," albeit not in bad faith, of taped statements by defendant); *United States* v. *Lonardo,* 350 F.2d 523 (6th Cir. 1965) (stenographic transcripts of interviews with witnesses destroyed in accordance with FBI procedures after "formal interview reports had been made out").

ate, sanctions will normally follow,[3] irrespective of the perpetrator's motivation, unless the government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant. See *United States* v. *Carrasco,* supra, 537 F.2d at 376-79; *Krilich* v. *United States,* 502 F.2d 680, 685-86 (7th Cir. 1974), cert. denied, 420 U.S. 992 (1975); cf. *Goldberg* v. *United States,* 425 U.S. 94, 111 n.21 (1976) ("Since courts cannot 'speculate whether [Jencks material] could have been utilized effectively' at trial, . . . the harmless-error doctrine must be strictly applied in Jencks Act cases."). This rule is consonant with language in earlier opinions of this court adverting to the appropriateness of sanctions for intentional "loss or suppression of evidence," *United States* v. *Miranda,* supra, 526 F.2d at 1328, and calling for a new trial where deliberately suppressed Jencks Act material subsequently surfaces and proves to be "merely material or favorable to the defense." *United States* v. *Hilton,* 521 F.2d 164, 166 (2d Cir. 1975), cert. denied, 425 U.S. 939 (1976). In educating personnel concerning their responsibilities in this area, government agencies must keep in mind the broad definition of discoverable "statements" incorporated in the governing texts.[4] We emphatically second the district court's obser-

[3] See *United States* v. *Miranda,* supra, 526 F.2d at 1324 n.4 (listing possible sanctions).

[4] Section (a)(1)(A) of Fed. R. Crim. P. 16 requires the government upon request to "permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government . . . ." Section (a)(1)(C) opens to the defendant's perusal

> books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are

(footnote continued on following page)

vation that any resulting costs in the form of added shelf space will be more than counterbalanced both by gains in the fairness of trials and also by the shielding of sound prosecutions from unnecessary obstacles to a conviction.

In the case at hand, however, we feel that it would be unwise and unjust to apply a strict prophylactic rule, given the mitigating factors expressly relied upon by the district court. Judge Lasker heard and credited testimony that the back-up recordings were "largely inaudible" and ex-

(footnote continued from preceding page)

> intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

The Jencks Act, 18 U.S.C. § 3500, regulates disclosure of statements by government witnesses; after such witnesses have testified, the defense may obtain "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." Id. § 3500(b). Section (e) of § 3500 defines "statement" as

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Also relevant in this regard are the disclosure obligations stemming from *Brady* v. *Maryland,* 373 U.S. 83 (1963); we agree with the District of Columbia circuit that *Brady* envisions that

> in framing their rules for evidence preservation, investigative agencies must define discoverable evidence very broadly, including any materials that "might" be "favorable" to the accused.

United States v. *Bryant, supra,* 439 F.2d at 652 n. 21. Cf. *United States* v. *Anzalone,* 555 F.2d 317, 321 (2d Cir. 1977), cert. denied 46 U.S.L.W. 3437 (Jan. 10, 1978) (recommending that FBI retain agents' handwritten notes of witness interviews).

ceedingly inferior in quality to the Nagra tapes; since the Nagra tapes were of "relatively high quality," the possibility that the defense could usefully have supplemented their content by resort to the back-up recordings is minimal. Also, we agree with the district court that, given "the nature and content" of the tapes played to the jury, there is "no reason to believe" that any such supplementary material "would have been favorable to the defense."[5] Finally, the FBI took extensive precautions to guard the recordings ultimately received in evidence from tampering during and after their creation.[6] Under the circumstances, we hold that Judge Lasker did not err in denying the motion to suppress.

III. *Third-Party Contact With the Jury*

At the opening of the third day of trial, the court and counsel were informed by a deputy clerk that

> The jurors called me into their rooms and they said

[5] For example, no gaps, attributable to unintelligibility or other flaw, are noted in the transcript passage most damaging to Bufalino's defense:

> RUSSELL B[UFALINO]: And if you gonna do it, don't do the right thing, I'm going to kill you [epithet omitted], and I'm going to do it myself and I'm gonna go to jail just for you.

[6] FBI agent Edwards' testimony on this critical point was summarized by Judge Lasker as follows:

> Edwards testified that in accordance with standard procedure he personally placed the Nagra device on Napoli's waist and activated it, and that, although the tape had run out, the machine was still in the "on" position when received by the F.B.I. at the conclusion of the conversations . . . As a precaution against tampering, the on-off switch was taped in the "on" position and the entire machine was wrapped in evidence tape around the midsection. On its return to the F.B.I. there was no indication that either the machine or the tape had been tampered with in any way.

> they are quite nervous . . . [E]very time they go in or out a couple of the spectators are glaring at them. They said no matter where they went they kept bumping into these people . . . .

After discussion of the problem with all the attorneys concerned, Judge Lasker decided to conduct a voir dire of the jurors individually in chambers, outside the presence of counsel.

We sanctioned this very procedure in *United States* v. *Miller,* 381 F.2d 529, 540 (2d Cir. 1967), cert. denied, 392 U.S. 927 (1968). Judge Lasker's decision to use it, in response to a request from Sparber's attorney, elicited no objection. Counsel for Jacobs was specifically asked if the voir dire would be acceptable to him, and he voiced no dissent. No timely suggestion was made, after all the parties had an opportunity to review the transcripts, that additional questioning with or without counsel present would be desirable.[7] Yet Bufalino now contends that the interviews denied him his right to be present at every stage of his trial, invoking Fed. R. Crim. P. 43. Given the factors reviewed above, we have no hesitation in rejecting, on waiver grounds, this tardily raised claim. It is fair to conclude that—here, as in *Miller*—counsel agreed not to be present when the juror interviews were conducted. To obviate such post hoc challenges altogether, district courts would do well in the future to elicit the express consent

[7] After the judge's charge, counsel for appellant Sparber did ask permission to question the *alternate* jurors further about spectator contacts to ascertain whether "the jurors associate the spectators with one [or] more of the defendants and think that through the spectators the defendants may have tried to do something wrong." Judge Lasker rejoined, we think correctly, that any such concerns could and should have been voiced long before the jury had retired to consider its verdict. In a finding to which we must give deference, he reiterated that "the trier of fact believes, and everything is on the record, that no juror was intimidated or resentful . . . ."

of all parties to any in-chamber juror interviews that may become necessary. Cf. *United States* v. *Taylor,* 562 F.2d 1345, 1365 (2d Cir.), cert. denied, 97 S.Ct. 2958 and 98 S.Ct. 170 (1977).

All three appellants also maintain that the Government failed to discharge its burden of establishing that the spectator "contacts" with the jurors did not affect the verdict. See *Remmer* v. *United States,* 347 U.S. 227, 229 (1954). But *Remmer* and its progeny apply only where the third-party contacts involve a "matter pending before the jury." See id. As we stated in *United States* v. *Brasco,* 516 F.2d 816, 819 (2d Cir.), cert. denied, 423 U.S. 860 (1975): "[w]here an unauthorized private communication, contact, or tampering with a juror during a trial does not relate to a matter pending before the jury, there is no right to a new trial absent a showing of prejudice by the defendant."

The *Brasco* standard governs this case. At issue here are laughs, stares, rebuffed efforts to start conversations and the entry of an unidentified female into the juror's bathroom following a plumbing breakdown elsewhere in the building. Any public trial can be expected occasionally to involve comparable incidents, and the district court's description of some of the perpetrators as "husky and menacing looking" does not of itself create a *Remmer* presumption of prejudicial contact.

In their interviews with Judge Lasker, all of the jurors who said they had seen or heard about spectator activity were asked if anything had happened that would affect their judgment. All responded with express denials except one, who said cryptically that "I am for law and peace," and denied that she was "in any fear about the situation." Were this in fact a *Remmer* situation involving contacts related to the trial, Judge Lasker's failure to pursue the matter might give us some pause. But here there was no presumption of prejudice, and we are mindful of the teaching that "[b]ecause of his continuous observation of the jury in court, a trial judge's handling of alleged juror misconduct or bias is only reviewable for abuse of discretion." *United States* v. *Panebianco,* 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977). On the record summarized above, the judge's refusal to order a mistrial following the voir dire was not an abuse of discretion.[8]

IV. *The Extension of Credit*

Appellants juxtapose the record and the language of the statute under which they were convicted, 18 U.S.C. § 894, in an effort to demonstrate that they were not shown to have engaged in any criminal activities cognizable in a federal court. One element of the crime for which appellants were convicted is an "extension of credit," with which coercive means of inducing repayment are associated. We are told that Jacobs extended no credit to Napoli, because Napoli got the jewels through deceit and never had any intention of paying for them. Accepting this, it does not follow that appellants' threats fell outside the ambit of 18 U.S.C. § 894. Congress took an exceedingly broad view of what it is "to extend credit," incorporating "any agreement, tacit or express, whereby the repayment or satisfaction of *any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising,* may or will be deferred." (Emphasis supplied). 18 U.S.C. § 891(1). Napoli's diamond swindle certainly gave rise to a claim accruing to the benefit of Jacobs, to which Napoli at least paid lip service. Cf. *United States* v. *Annerino,* 495

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[8] Appellants also argue that the district court's questioning of the jurors was leading and incomplete. But as already noted, appellants had ample opportunity to request supplemental inquiries after receiving a transcript of the interrogations. Had any of the jurors evinced some recollection of potentially prejudicial third-party overtures, we have no doubt that the district court's inquiry would have expanded substantially.

F.2d 1159, 1166 (7th Cir. 1974) (finding extension of credit in unauthorized use of credit cards and theft of partnership funds, followed by repayment agreement); *United States* v. *Briola,* 465 F.2d 1018, 1020-21 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973) (finding extension of credit in debt arising from fraudulent bets placed with bookmaking concern, followed by repayment agreement). Appellants suggest that this case presents merely an aggrieved shopkeeper seeking redress from a self-confessed swindler. We put to one side whether Congress lacks power to punish threats of violence even in such homespun contexts, cf. *United States* v. *Perez,* 426 F.2d 1073, 1080 (2d Cir. 1970), aff'd, 402 U.S. 146 (1971); appellant Jacobs' strategy for ensuring repayment was hardly commensurate with ordinary notions of self-help.

Concededly, appellants were not involved in a classic loan-sharking operation, the specific evil against which Congress interposed 18 U.S.C. § 894. See *Perez* v. *United States,* 402 U.S. 146 (1971). However, *Perez* has not been construed to suggest that only those so engaged with proven organized crime connections may constitutionally be convicted under the statute. See *United States* v. *Keresty,* 465 F.2d 36, 42-43 (3d Cir.), cert. denied, 409 U.S. 991 (1972); *United States* v. *Annerino,* supra, 495 F.2d at 1165. We agree with those courts that *Perez,* having established that Congress has power under the Commerce Clause to proscribe the class of extortionate activities in which appellants engaged, precludes us from " 'excis[ing], as trivial, individual instances' of the class." *Perez* v. *United States,* supra, 402 U.S. at 154.

V. *Conclusion*

Appellants' remaining contentions require little comment. The trial court was empowered by 18 U.S.C. § 894 to impose separate sentences for participation in the use

of extortionate means and conpiracy to do so.[9] Appellant Bufalino urges that the trial judge relied on misinformation in pronouncing sentence. But appellant did not avail himself of his opportunity to specifically contest the truth of any such statements during the sentencing proceeding, nor did he request an evidentiary hearing on any of the purportedly false allegations.

We have considered appellants' challenges to the trial court's charge to the jury, and find no reversible error. Appellants' contention that they were denied a speedy trial is specious, since the district court properly found that delays otherwise excessive were tolled by the unavailability of an essential prosecution witness. After consideration of all appellants' other arguments, we find merit in none. The judgment of conviction is affirmed.

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[9] Both offenses are proscribed, in the disjunctive, by the section. We cannot agree with appellants that "proof of one offense would necessarily prove the other." Certainly one could participate alone in the use of extortionate means, conspiring with no one, or conspire to undertake an extortionate scheme that never ripened into a substantive offense. Cf. *United States* v. *DeStafano,* 429 F.2d 344, 348 (2d Cir. 1970), cert. denied, 402 U.S. 972 (1971) (casting doubt on validity of argument identical to that advanced here).

Decision and Order of the District Court on Motion to Suppress.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Cr. 982 (MEL)

MEMORANDUM

UNITED STATES OF AMERICA,

—v—

RUSSELL BUFALINO, HERBERT JACOBS, MICHAEL SPARBER and JOSEPH LAPADURA,

Defendants.

APPEARANCES:

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Decision and Order of the District Court on Motion to Suppress.

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LASKER, D.J.

Russell Bufalino, Michael Sparber, Herbert Jacobs and Joseph Lapadura are charged in a two count indictment with using extortionate means to collect extensions of credit from one Jack Napoli and conspiracy to do the same in violation of 18 U.S.C. § 894. They move to suppress all evidence, including Nagra tape recordings, transcripts thereof and testimony, with respect to three conversations between Napoli and one or more of the defendants on the ground that the F.B.I. agent in charge of the investigation intentionally destroyed a duplicate set of recordings of those same conversations made by the use of a Kel transmitting device. In addition, Sparber and Bufalino move for divers relief based on their suspicion of other improper government action in the conduct of the investigation.

A. The Destruction of the Kel Tapes

An evidentiary hearing was held in two parts on May 5 and May 9, 1977. The government presented the testimony of Stephen F. Edwards, the agent who destroyed the Kel tapes, and Paul Ginsberg, an expert in audio engineering. The defendants presented no witnesses. The facts, which are not disputed, are as follows.

Decision and Order of the District Court on Motion to Suppress.

1. *Facts*

On three occasions during the course of the investigation which resulted in the pending indictment, Edwards equipped Napoli, a goverment informant, with recording devices and taped conversations between Napoli and various individuals, including the defendants Bufalino, Sparber and Jacobs. These conversations took place, for the most part, in and near the Vesuvio Restaurant on West 48th Street in Manhattan. They form a vital part of the government's case.

On each occasion Napoli was outfitted with a Nagra tape recorder and a Kel transmitter, and the two units operated simultaneously. The Nagra device is a self-contained tape recording unit. The Kel transmitter, as its name implies, is only a transmitting device, through which Napoli's conversations were monitored by F.B.I. agents at several nearby locations. The agents recorded the Kel transmissions as they were broadcast over radio receivers.

All three conversations were recorded on the Nagra machine. The F.B.I. agents made a single recording of the Kel transmission of the first conversation, which took place on April 12, 1976, on a Sony cassette located in a truck parked several hundred feet from the Vesuvio Restaurant. They made two recordings of the Kel transmission of the second and third conversations, on April 16th and 20th, one on the Sony cassette, which was in a surveillance car, and one on an SK 8 tape recorder located in the suitcase of a surveillance agent who was inside the restaurant.

Agent Edwards, who personally monitored all three conversations, listened to all of the tapes. (Tr. 75) He played each of the Nagra tapes as well as the single Kel recording of the 12th and the two Kel recordings of the 20th on the day they were made. He played the two Kel recordings of the conversation of the 16th several days after that date. With regard to each of the three conversations, Edwards

Decision and Order of the District Court on Motion to Suppress.

listened at least once to all of the recordings at one sitting, one after the other.[1] He testified that for each conversation the Nagra recording was "far superior" to any of the Kels. (Tr. 79-80) The latter, he said, were "largely inaudible." (Tr. 79) This result conformed to his experience in previous situations where duplicate recordings had been made in that the Nagra recordings were consistently more audible than recordings of Kel transmissions.

Edwards testified that his principal purpose in using the Kel transmitter was to monitor the conversations and be able to step in to protect Napoli in the event of danger. He stated that the taping of the Kel transmissions was strictly a secondary, back-up procedure "to have something salvageable" in the event the Nagra device malfunctioned. (Tr. 104) Having compared the recordings and found the Nagras to be superior, Edwards concluded that there was "absolutely no use for [the Kel recordings]." (Tr. 80) He believed it to be standard F.B.I. procedure to destroy such tapes, and after consulting with brother agents who confirmed that this was the thing to do, he disposed of them. This was, as best Edwards could recall, about a week or so after they were made.

Although Edwards was in constant contact with the United States Attorney's Office, and in fact forwarded the Nagra tapes to the Assistant handling the investigation within a day or two of their making (Tr. 141), he never informed the office that the Kel transmissions had been taped or that the tapes had been destroyed. These facts first came to light when Edwards was asked by defense counsel whether the transmissions had been taped at a pre-trial conference on November 18, 1976.

The government's expert, Ginsberg, testified that Nagra recording equipment is in all respects superior to the Kel device and that, assuming proper functioning, Nagra recordings are accordingly consistently more audible and

reliable than those made on Kel machinery. It is, of course, not disputed, however, that there were at least some audible passages on the Kel recordings. Further, it cannot be said with certainty that there were no portions of the conversations audibly recorded through the use of the Kel machine which were inaudible on the Nagra tapes, although Edwards did testify that he recalls no such instances and believes none to have existed. See note 1, *supra.*

2. *Discussion*

The defendants argue that Edwards' deliberate destruction of tape recordings which are clearly discoverable under Fed. R. Cr. P. 16 and fall within the Jencks Act, 18 U.S.C. § 3500, requires suppression of all remaining evidence regarding the three conversations. The government responds that such relief is unwarranted where, as here, the destroyed tapes were, at best, grossly inferior duplications of the Nagra material, all of which has been carefully preserved and made fully available to the defense, and the destruction, though intentional, was in good faith. In these circumstances, the government argues, the defense should be required to make a showing of prejudice, such as the real possibility that exculpatory material may have been lost, before the sanction of exclusion should be considered.

In determining whether to impose sanctions on the government for the loss or destruction of evidentiary material a court is required to weigh "the extent of the Government's culpability for the loss or destruction and the amount of prejudice to the defense which resulted." *United States* v. *Miranda,* 526 F.2d 1319, 1325-26 (2d Cir. 1975), *cert. denied,* 45 U.S.L.W. 3249, Oct. 4, 1976. Here, government culpabiilty is high. It is undisputed that Edwards deliberately destroyed the Kel tapes. The defendants' argument that this, alone, requires suppression,

however, is an overstatement. Indeed, in *United States* v. *Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972), cited with approval in *Miranda, supra,* the Second Circuit affirmed a conviction which was challenged, *inter alia,* on the grounds that the district court failed to suppress evidence regarding a conversation between the defendant and a government informant because the *single* recording of that conversation had been intentionally destroyed by police. Significantly, the reason given by the police for their action in *Augello* was that the tape recording, which appears to have been made by the use of a Kel transmitter, was unintelligible. 451 F.2d at 1169-70.

On the other side of the coin, indication of prejudice to the defendants from Edwards' actions is singularly weak. The defendants attempt to discredit the reliability of the Nagra recording by suggesting that Napoli might have turned the machine off at certain points in the conversations or tampered with the tapes in the period they were in his custody following the conversations but prior to being picked up by the F.B.I. agents. (Tr. 89-100) In contrast, they argue, the Kel recordings would necessarily have been reliably complete. This attack on the Nagra tapes is purely speculative, and it is undermined by the fact that there was no evidence that Napoli had tampered with the Nagra machine.[2] In addition, Edwards, who monitored all three conversations and listened to all of the tapes, testified that so far as he is aware, the Nagra machine was neither turned off nor tampered with and the resulting recording is a continuous and complete reflection of the conversation. (Tr. 153-54) Moreover, we credit Edwards' testimony that the Kel recordings were seriously inferior to those made on the Nagra machine, "very distorted and static" (Tr. 80) and, indeed, "largely inaudible." (Tr. 79)[3] In contrast, although there undeniably are portions which cannot be discerned, the Nagra

recordings, when filtered, are of a relatively high quality.[4]

In *United States* v. *Miranda, supra,* the court approved the district court's refusal to suppress testimony by an undercover informant and police officers about the critical conversation between the informant and the defendant, where the conversation had been monitored and recorded by the use of a Kel device, but the tape, the *only* recording made, had been lost due to negligence of the police. The court observed that in view of all the other evidence it was "more likely" that the tape would have corroborated the government's version of the conversation than the defendant's and that the defense had been permitted to bring out all the facts surrounding the loss of the tape and to attempt to make the most out of it before the jury. 526 F.2d at 1327-29. In these circumstances, the court concluded that suppression "would be an unduly heavy sanction to impose upon the Government for the loss of a piece of evidence concerning a subject on which there was other primary evidence available and adduced." *Id.* at 1329.

The decision applies here. As in *Miranda,* there is no reason to believe that any material on the Kel tapes which might have clarified some of the inaudible portions of the Nagra tapes, assuming such material existed, would have been favorable to the defense, in view of the nature and content of the Nagra recordings. Thus, this is emphatically not a case, such as *United States* v. *Carrasco,* 537 F.2d 372 (9th Cir. 1976), on which the defendants rely, where the record indicates that the destroyed evidence is likely to have contained important evidentiary material not otherwise preserved which might prove helpful to the defendant. Nor, although the destruction was wilfull, is there any hint of bad faith in this record. Compare, *United States* v. *Lonardo,* 350 F.2d 523 (6th Cir. 1965). Indeed, the record indicates that Edwards believed he was acting in accordance with F.B.I. procedures. While this does not exonerate his ac-

tions, *United States* v. *Carrasco, supra,* 537 F.2d at 376; *Lee* v. *United States,* 368 F.2d 834, 837 (D.C. Cir. 1966), destruction of tapes due to unintelligibility is in fact a practice which has been countenanced by the courts. *United States* v. *Augello, supra; United States* v. *Bryant,* 448 F.2d 1182, 1184 (D.C. Cir. 1971) (intentional non-preservation of tapes). Under *Miranda,* suppression here might be inappropriate even if no other recordings were preserved. It is especially so given the existence of the complete set of Nagra tapes of generally high quality.[5]

This disposition of the motion should not be interpreted as approval of the procedures employed here by Agent Edwards. Determinations as to the usefulness of tape recorded evidence containing Rule 16, "3500" and, possibly, *Brady* material, are for the court and counsel, not the F.B.I. Whatever burden the preservation of extra reels or cassettes of tape may impose on the facilities of law enforcement agencies is vastly outweighed by both the defendant's interest in the preservation and availability of *all* evidence which might arguably prove useful to him and the public interest in minimizing the threat to an otherwise sound prosecution posed by such careless practices. The Second Circuit has recently cautioned that the F.B.I. would be "well advised" to retain handwritten notes of interviews with witnesses even after final typewritten reports have been prepared. *United States* v. *Anzalone,* Dkt. Nos. 76-1458 and 76-1461, May 6, 1977, slip op. at 3399. This statement was made despite the fact that the court has consistently held such notes not to be Jencks Act material. *A fortiori,* a similar warning is in order with respect to tapes such as those here at issue, which are indisputably within the ambit both of Rule 16 and the Jencks Act.

B. Other Alleged "Governmental Misconduct"

Both Bufalino and Sparber move for additional relief based on another aspect of the case. The government has

disclosed that the extensions of credit on which the indictment is based involve a series of transactions between Napoli and the defendant Jacobs sometime in February and/or March, 1977, in which Napoli obtained diamonds and certain other jewelry from Jacobs in return for promises of repayment and, in the case of the first transaction, for a check. Napoli's check, however, was written on the account of a defunct company, and it bounced. These and other circumstances tend to indicate that Napoli was attempting to defraud Jacobs. The government has further disclosed that Napoli first reported his difficulties with the defendants over his debt to Jacobs to state authorities in March, 1977, and to the F.B.I. in early April, at a time after the debt arose when the defendants were allegedly pressuring him for repayment. However, Napoli had previously given information regarding other activities to law enforcement officials. As part of this prior cooperation in the period January to March, 1977, Napoli gave information to the F.B.I. in Newark, New Jersey, which, although unrelated to the events here in issue, did contain minor references to the defendants Jacobs and Bufalino. He was paid $400. for this earlier information.

Based on these facts Sparber hypothesizes that the F.B.I. was behind Napoli's transaction with Jacobs from the inception. He moves 1) to suppress all evidence regarding these transactions on grounds of governmental misconduct and 2) for pretrial disclosure of material in the F.B.I. reports regarding Napoli's prior cooperation which might reveal, generally, that their involvement together at the outset of the transaction was greater than the government has represented and, specifically, the basis for the earlier $400. payment.

It is unclear whether Sparber's reference to misconduct is an allusion to possible entrapment or simply the fact that Napoli may have initially obtained the jewelry from Jacobs in the course of a fraudulent scheme. In either case

there is no basis whatsoever for suppression. Though there is little to suggest entrapment based on the government's disclosures to date, Sparber will of course be free to attempt to establish this defense at trial. It is not grounds for pretrial relief in the form of suppression. Nor is there reason to believe the government was behind the initial "fraud" on Jacobs. Even if it was, however, Sparber cites no authority for his claim that this would be misconduct in any way sufficient to warrant suppression.

With regard to Sparber's request for disclosure, the court has examined *in camera* the F.B.I. reports regarding its dealings with Napoli from January through the events in question. The reports confirm the essential outlines of the government's initial representations regarding the history of Napoli's involvement as an informant. Accordingly there is no basis for furnishing these reports to counsel prior to trial, at which time, when Napoli takes the stand, they will of course be entitled to review them. 18 U.S.C. § 3500.

Bufalino moves to dismiss the indictment on the grounds that the facts set out above preclude proof of an "extortionate extension of credit" as defined in 18 U.S.C. § 891(6). The short answer to this is that under 18 U.S.C. § 894, the only statute on which the indictment is based, there is no requirement that an extortionate extension of credit be established. Further, any suggestion that the facts alleged do not constitute an offense under § 894 because of the possibility that the underlying debt may itself have been incurred in the course of an illegal scheme by Napoli to defraud Jacobs is without merit. It is a violation of § 894 to use extortionate means to collect any extension of credit. Under § 891(1),

> "To extend credit means to . . . enter into any agreement . . . whereby repayment or satisfaction of *any debt . . . whether acknowledged or disputed, valid*

or invalid, and however arising, may or will be deferred." (emphasis supplied)

There is thus no suggestion of a limitation such as that suggested by Bufalino in the language of the statute. Moreover, two courts of appeals have expressly held that the statute includes debts arising out of illegal or deceitful schemes by the debtor to take advantage of the creditor. *United States* v. *Annerino,* 495 F.2d 1159, 1166 (7th Cir. 1974) (unauthorized use of credit cards and misappropriation of partnership funds); *United States* v. *Briola,* 465 F.2d 1018, 1020 (10th Cir. 1972), *cert. denied,* 409 U.S. 1108, *reh. denied,* 410 U.S. 960 (1973) (theft from employer).

For the foregoing reasons, the motions to suppress due to the destruction of the Kel tapes are denied without prejudice to renewal at trial in the event the testimony justifies such a course. See note 2, *supra.* The other motions are denied.

It is so ordered.

Dated: New York, New York
June 7, 1977.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

[1] He did not specifically compare portions of the two or three recordings of each conversation to learn whether an inaudible portion of the Nagra tape may have been audible on either of the Kel tapes. However his testimony was emphatic that so far as he noted at the time and could recollect, there was nothing on the Kel tapes which was not also on the Nagras. (Tr. 151-52)

[2] Edwards testified that in accordance with standard procedure he personally placed the Nagra device on Napoli's waist and activated it, and that, although the tape had run out, the machine was still in the "on" position when received by the F.B.I. at the

conclusion of the conversations. (Tr. 89-90; 98) As a precaution against tampering, the on-off switch was taped in the "on" position and the entire machine was wrapped in evidence tape around the midsection. On its return to the F.B.I. there was no indication that either the machine or the tape had been tampered with in any way. (Tr. 161-63)

The defendants sought to have Napoli, who is currently in the witness protection program, produced at the hearing for examination as to whether or not he interfered in any way with the Nagra recording device either during or after the conversations. This request was denied, but at trial the defendants will be permitted to question Napoli in this regard. Should Napoli's testimony alter the factual basis for today's ruling, the defendants will be permitted to renew their motion to suppress.

[3] The court has on numerous occasions in the past heard recordings made over a Kel transmitter and takes judicial notice that such recordings are often of poor quality and rarely of good quality. A technical explanation for the Kel's consistently inferior recording quality was provided by the testimony of the government's expert, Ginsberg.

[4] On April 23, 1977 a hearing was conducted with regard to the audibility of the Nagra recordings. Significant portions of all three tapes were played through a filtering device, including, of course, those passages on which the government intendes to rely at trial. Although certain short portions were found to be inaudible, the tape was, for the most part, found to be of exceptional clarity as tape recordings of this kind go.

[5] It is true that the *Miranda* court distinguished inadvertent loss from deliberate destruction and stated:

> "[T]his is not a case of intentional, deliberate, or bad faith loss or suppression of evidence by government agents in which prophylactic sanctions against the Government would be appropriate. The loss of the tape recording by the agents [in *Miranda*] was merely inadvertent or negligent." 526 F. 2d at 1328.

Although *dicta* in this passage can be read to suggest that a showing of intentional destruction is alone enough to warrant suppression, for the reasons stated above we disagree with this interpretation.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of May, one thousand nine hundred and seventy-eight.

Present: HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
HON. WALTER R. MANSFIELD,
Circuit Judges.

77-1438
77-1444
77-1445

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUSSELL BUFALINO, MICHAEL SPARBER, HERBERT JACOBS, JOSEPH LAPADURA, a/k/a Lefty,

Defendants-Appellants,

RUSSELL BUFALINO, MICHAEL SPARBER, HERBERT JACOBS,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER
Deputy Clerk

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of July, one thousand nine hundred and seventy-eight.

Present:

HON. PAUL R. HAYS
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD

Circuit Judges.

77-1438

United States of America,

Plaintiff-Appellee,

v.

Russell Bufalino, Michael Sparber, Herbert Jacobs, Joseph Lapadura, a/k/a "Lefty",

Defendants,

Russell Bufalino, Michael Sparber, Herbert Jacobs,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Russell Bufalino,

Order Denying Petition for Rehearing.

Upon consideration thereof, it is
Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of July, one thousand nine hundred and seventy-eight.

77-1438

United States of America,

Plaintiff-Appellee,

v.

Russell Bufalino, Michael Sparber, Herbert Jacobs, Joseph Lapadura, a/k/a "Lefty",

Defendants,

Russell Bufalino, Michael Sparber, Herbert Jacobs,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Russell Bufalino, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Irving R. Kaufman
Chief Judge

Nos. 78-232 and 78-5218

In the Supreme Court of the United States

OCTOBER TERM, 1978

RUSSELL BUFALINO, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL SPARBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a)[1] is reported at 576 F. 2d 446. The opinion and order of the district court denying the motion to suppress (Pet. App. 14a-25a) is reported at 432 F. Supp. 651.

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[1]"Pet. App." refers to the appendix to the petition in No. 78-232.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1978. A petition for rehearing was denied on July 10, 1978 (Pet. App. 28a-29a). The petitions for a writ of certiorari were filed on August 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony of the chief prosecution witness and tapes of petitioners' conversations should have been suppressed because discoverable back-up tapes of the conversations were destroyed by a government agent.

2. Whether spectator activity during the trial constituted impermissible contact with the jurors, so as to require reversal of petitioners' convictions.

3. Whether the imposition of consecutive sentences for the conspiracy and substantive offenses designated in 18 U.S.C. 894 violated the Double Jeopardy Clause.

4. Whether the government's expenditure of $46,000 on its chief witness in connection with his participation in the Witness Relocation Program constituted a violation of petitioners' due process rights.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to use extortionate means to collect an extension of credit and participating in the use of extortionate means to collect an extention of credit, in violation of 18 U.S.C. 894. Petitioner Bufalino was sentenced to four years' imprisonment on the conspiracy count to be followed by five years' probation on the substantive count. He was also fined $10,000 on each count. Petitioner Sparber was sentenced to one year's imprisonment on the conspiracy count to be followed by five years' probation on the substantive count. The court of appeals affirmed (Pet. App. 1a-13a).

1. The evidence adduced at trial showed that in February 1976, Herbert Jacobs, a New York jeweler, sold Jack Napoli, on credit, jewelry worth approximately $25,000 (Tr. 66-71). When Napoli failed to pay for the jewelry, Jacobs told him that he wanted his money and that if Napoli "didn't do the right thing, [he] was going to get hurt" (Tr. 86). After Napoli continued in default, Jacobs told him "it was going to be out of his hands pretty soon, he wasn't going to hold anybody off any longer and he wanted the money and he better get paid" (Tr. 87). Jacobs then went to petitioners Bufalino and Sparber for help in collecting the debt (Pet. App. 3a).

Shortly thereafter, petitioner Sparber called Napoli and told him that if Napoli didn't repay the debt or return the jewelry, Sparber was going to burn his house down and that "he didn't care who got hurt" (Tr. 90). Sparber subsequently called again and told Napoli, "You better get things squared away if you don't want get hurt. But you better come up with the merchandise or the money" (*id.* at 91). Sparber attempted to get Napoli to meet with him (*ibid.*), but instead Napoli went to Florida to meet with Bufalino directly, in an effort to settle the matter (Tr. 92). Bufalino ordered Napoli to pay the debt and to meet with Sparber in New York (Tr. 96-101).

Knowing that he would not be able to come up with the money and frightened by the threats, Napoli then contacted the FBI (Tr. 101). The FBI outfitted him with recording and transmitting devices, and Napoli subsequently recorded various telephone and face-to-face conversations between himself and petitioners. During the

surveillance period, Sparber and Bufalino warned Napoli that he would be subjected to bodily harm if he failed to pay the debt (Tr. 102, 113-118). Bufalino told Napoli that if he didn't "do the right thing here," Bufalino was going to kill him (Tr. 122-124). Jacobs later assured Napoli over the telephone that "as long as everything gets straightened out, nobody will kill you" (Tr. 205).[2]

2. Prior to trial, petitioners moved to suppress Napoli's testimony and certain recordings of their conversations with Napoli. The evidence adduced at the pre-trial suppression hearing is related in detail, in the opinion of the district court, denying the motion to suppress (Pet. App. 16a-18a) and may be summarized as follows: On three occasions in April 1976, during the course of the investigation of this case, FBI agent Stephen Edwards equipped Napoli with devices that recorded and transmitted conversations between Napoli and various individuals, among them petitioners Bufalino and Sparber. These devices included a Nagra tape recorder and a Kel transmitter, through which Napoli's conversations were monitored by FBI agents at several nearby locations. The agent recorded the Kel transmissions as they were broadcast over radio receivers.

Agent Edwards, who monitored the three conversations, listened to all of the tapes. He testified that the Nagra recordings were all superior to the Kel transmission recordings, which he said were largely inaudible. This result conformed to his experience that Nagra recordings are consistently more audible than recordings of Kel transmissions.

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[2]Jacobs was convicted with petitioners of violating 18 U.S.C. 894. He was sentenced to three years' probation and fined $2,500.

Edwards testified that his principal purpose in using the Kel transmitter was to monitor the conversations and to be able to step in to protect Napoli in the event of danger. He stated that taping the Kel transmissions was strictly a secondary, back-up procedure in the event the Nagra device malfunctioned. Having compared the recordings and found the Nagra recordings to be superior, he concluded that there was "absolutely no use for [the Kel recordings]." He believed it to be standard FBI procedure to destroy such tapes, and after consulting with other agents, he disposed of them about a week after they were made.

ARGUMENT

1. Both petitioners contend (Bufalino Pet. 7-9; Sparber Pet. 15-16) that Napoli's testimony and the tapes of their face-to-face conversations with Napoli should have been suppressed because of the destruction of the back-up tapes, which were discoverable under Fed. R. Crim. P. 16 and producible under the Jencks Act, 18 U.S.C. 3500. The district court found, however, that the back-up tapes were "largely inaudible" and exceedingly inferior in quality to the Nagra recordings, which were of a relatively high quality. The district court further found (Pet. App. 19a) that the Nagra machine was neither turned off nor tampered with during the conversations and that the resulting recordings were continuous and complete reflections of those conversations. Furthermore, the district court found "no reason to believe that any material on the [back-up] tapes which might have clarified some of the inaudible portions of the Nagra tapes, assuming such material existed, would have been favorable to the defense, in view of the nature and content of the Nagra recordings" (Pet. App. 20a). While, as both courts below held, the back-up tapes should not have been destroyed (Pet. App. 5a-6a), the failure to

retain the tapes in this case did not require the suppression of evidence, since it was clear that the tapes were not destroyed in bad faith and that they would not have aided petitioners' case if they had been preserved. As the Second Circuit stated in *United States* v. *Miranda*, 526 F. 2d 1319, 1329 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976), suppression "would be an unduly heavy sanction to impose upon the Government for the loss of a piece of evidence concerning a subject on which there was other primary evidence available and adduced." See also *United States* v. *Shafer*, 445 F. 2d 579, 582 (7th Cir. 1971); cf. *United States* v. *Bryant*, 439 F. 2d 642, 653 (D.C. Cir. 1971).

In *United States* v. *Well*, 572 F. 2d 1383 (9th Cir. 1978), relied on by petitioners, the Ninth Circuit held that sanctions are required when Jencks Act material is destroyed, even in the absence of a showing that the defendant is prejudiced by the loss of the material. In *Well*, however, the tape destroyed was the only available recording; the court made it clear that its holding was limited to cases, unlike this one, in which "the information in the destroyed statement is not otherwise available." *Id.* at 1384, citing *United States* v. *Carrasco*, 537 F. 2d 372, 376-377 n. 2 (9th Cir. 1976). In *United States* v. *Harrison*, 524 F. 2d 421 (D.C. Cir. 1975), on which petitioners also rely, the District of Columbia Circuit warned against the routine destruction of rough notes of witness interviews. There is nothing in that opinion, however, to suggest that the court would impose sanctions in a case in which it was found that the defendant was not prejudiced by the destruction of the notes—particularly where, as here, the destroyed material was duplicated by other material of the same nature. Indeed, in the subsequent case of *United States* v. *Quiovers*, 539 F. 2d 744 (D.C. Cir. 1976), the court looked to the "total circumstances"—and, in particular, the lack of a showing of prejudice—in declining to dismiss an indictment because of government destruction of discoverable tape recordings.

2. At the opening of the third day of trial, the court and counsel were informed by a deputy clerk that (Tr. 226-227):

> The jurors called me into their room and they said they are quite nervous. They seem to, every time they go in, or out a couple of the spectators are glaring at them. They said no matter where they went they kept bumping into these people, elevators, outside.

After discussing the problem with counsel the court decided to conduct a *voir dire* of the jurors individually in chambers outside the presence of counsel. No objection was made to that procedure (Pet. App. 9a). The *voir dire* (Tr. 231-244) showed that nine of the juriors had heard no statements from the spectators and had noticed no unusual spectator activity. Four reported that some of the spectators either stared at them as they went in and out of the jury box or tried to make eye contact with them, and two reported that they had rebuffed efforts by a spectator to start a conversation with them in the hall. All the jurors who said they had seen or heard about spectator activity were asked if anything had happened that would affect their judgment. All responded with express denials except for one, who said cryptically that "I am for law and peace" and denied that she was "in any fear about the situation" (Tr. 231-234).[3] After reviewing the court's

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[3]That jurior did not, as petitioner Bufalino maintains (Bufalino Pet. 6), indicate that the spectator activity would interfere with her ability to decide the case fairly.

report on the *voir dire*, petitioners moved for a mistrial, which was denied. Relying on *Remmer* v. *United States*, 347 U.S. 227 (1954), petitioners contend (Bufalino Pet. 9-11; Sparber Pet. 17-20) that the denial was error.

In *Remmer*, an unnamed person told one of the jurors that he could profit by bringing in a verdict favorable to the defendant. In remanding the case for a hearing to determine whether the defendant was prejudiced by this contact, the Court held that any unauthorized "private communication, contact or tampering" with a juror "during a trial about the matter pending before a jury" is presumed to be prejudicial, and a new trial must be granted unless the government can establish that the contact was harmless. 347 U.S. at 229. In this case, as the court of appeals noted, the "contacts" were limited to "laughs, stares, rebuffed efforts to start conversations and the entry of an unidentified female into the jurors' bathroom following a plumbing breakdown elsewhere in the building" (Pet. App. 10a). This degree of contact does not rise to the level of "private communication, contact or tampering" required to trigger the presumption of prejudice to the defendant. As the court of appeals further observed, "[A]ny public trial can be expected occasionally to involve comparable incidents, and the district court's description of some of the perpetrators as 'husky and menacing looking' does not of itself create a *Remmer* presumption of prejudicial contact.[4] (Pet. App. 10a). In

[4]The instant case is clearly distinguishable from *United States* v. *Ferguson*, 486 F. 2d 968 (6th Cir. 1973), and *Stone* v. *United States*, 113 F. 2d 70 (6th Cir. 1940). In *Ferguson*, a friend of the defendant made comments to a juror favorable to the defendant and specifically discussed an aspect of the case. In *Stone*, a former assistant of defendant's attorney attempted to bribe a juror.

light of the district court's finding that "no juror was intimidated or resentful" (Tr. 1023), the court properly refused to order a mistrial.[5] See *United States* v. *Brasco*, 516 F. 2d 816, 819 (2d Cir.), cert. denied, 423 U.S. 860 (1975).

3. Petitioner Bufalino further contends (Bufalino Pet. 11-12) that the consecutive sentences he received for the substantive and conspiracy offenses under 18 U.S.C. 894 violated the Double Jeopardy Clause. It is well-settled, however, that a substantive offense and a conspiracy to commit that offense are separate crimes that can be separately punished. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593 (1961); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946). The rationale of that principle applies not only to prosecutions under the general federal conspiracy statute, 18 U.S.C. 371, but also to prosecutions under special conspiracy provisions such as the one contained in Section 894. A substantive violation of Section 894 requires proof that the defendant participated in the use of extortionate means to collect an extension of credit, while a conspiracy offense under Section 894 requires proof that the defendant agreed with others to use or attempt to use extortionate means to collect an extension of credit. Since each offense contains at least one element not present in the other, the

[5]Petitioner Sparber also contests the district court's refusal to grant his request, made after the judge's charge, to examine the alternate jurors concerning spectator activity (Sparber Pet. 18). The court replied that the appropriate time for such questioning had long since passed. Petitioners had ample opportunity to request supplemental inquiries after they received a transcript of the interrogation, rather than waiting to make such a request until the jury retired to consider its verdict.

two constitute separate offenses for the purpose of double jeopardy analysis. See *Blockburger* v. *United States*, 284 U.S. 299 (1932).[6]

4. Finally, petitioner Bufalino contends (Pet. 12-15) that the government acted improperly in spending $46,000 in connection with Napoli's participation in the Witness Relocation Program, and that the indictment should be dismissed for that reason.

This claim provides no basis for dismissing the indictment. The $46,000 that petitioner characterizes as tantamount to a bribe was expended to feed, clothe, house, and pay medical expenses for a family of five over the 15-month period that they were under government protection, and to move them and their household effects on three separate occasions in response to threats on Napoli's life. In no sense was the sum paid to Napoli a type of "contingent fee" such as that criticized in *Williamson* v. *United States*, 311 F. 2d 441 (5th Cir. 1962). There, a government informant was offered payment to produce evidence against particular defendants with respect to crimes not yet committed. In this case, at the time Napoli contacted the FBI he had repeatedly been threatened by petitioners; the promises

[6]Neither *Jeffers* v. *United States*, 432 U.S. 137 (1977), nor *Simpson* v. *United States*, 435 U.S. 6 (1978), aids petitioner's cause. In both cases this Court held that the statutes pursuant to which cumulative sentences were imposed prohibited precisely the same conduct. That situation, as we have shown, does not obtain here. The substantive and conspiracy offenses enumerated in Section 894 are closely analogus to the substantive and conpiracy offenses enumerated in the Hobbs Act, 18 U.S.C. 1951. This Court has held those offenses can be separately charged and punished. *Callanan* v. *United States*, *supra*.

made to Napoli were simply the standard promises of relocation that are regularly made to participants in the Witness Relocation Program.[7]

At trial the district court allowed petitioners broad latitude to probe Napoli's background and motives, and considerable testimony was elicited relating to his participation in the Witness Relocation Program. Moreover, the court properly instructed the jury that it could take Napoli's relationship with the government into consideration in assessing his credibility (Tr. 991). Accordingly, Napoli's participation in the Witness Relocation Program violated none of petitioners' rights, and the credibility of Napoli, as a government informant was properly left to the trier of fact. See *On Lee* v. *United States*, 343 U.S. 747, 757-758 (1952); *United States* v. *Henderson*, 422 F. 2d 454, 456 (6th Cir. 1970).

[7]There is nothing in the record to support petitioner's allegation (Bufalino Pet. 13) that the United States marshals assisted Napoli in the commission of a crime. As for the government's bringing his cooperation to the attention of sentencing judges in state prosecutions, this is a routine procedure which a cooperating individual can reasonably expect whether promised or not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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